Supreme Court, U.S.
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No. 95-1981

In The

Supreme Court of the United States

October Term, 1995

MARY ANNA GNADT,

Petitioner,

vs.

ERNEST G. CASTRO and CASTRO FAMILY, INC. t/a MAMA'S ITALIAN RESTAURANT AND TINO'S SPORTS LOUNGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether § 704(a) of Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against any of his employees or applicants for employment for engaging in protected activity under Title VII, extends to a former employee for acts of retaliation allegedly occurring after the employment relationship has ended?

PARTIES TO THE PROCEEDING

1. Mary Anna Gnadt (hereinafter referred to as "Gnadt"), Plaintiff in the District Court and Petitioner.

2. Ernest G. Castro (hereinafter referred to as "Castro"); Castro Family, Inc., t/a Mama's Italian Restaurant and Tino's Sports Lounge (hereinafter referred to as "Tino's"), Defendants in the District Court and Respondents.

Pursuant to Rule 29 of the Rules of Supreme Court of the United States, Ernest G. Castro and Castro Family, Inc., the Respondents, make the following disclosure:

(i) Respondents are not publicly held corporations or other publicly held entities.

(ii) Respondents are not a parent subsidiary or affiliate of, or a traded association representing, a publicly held corporation or other publicly held entity.

(iii) No publicly held corporations or entities have a direct financial interest in the outcome of this litigation.

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Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Fourth Circuit.

Title VII § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. The issue in need of resolution is whether the term "employees" includes a former employee who voluntarily resigned against the will of her employer and later alleged acts of retaliation occurring after the employment relationship ended. If the answer is in the affirmative, the Court must then decide if a retaliation claim may survive absent a showing by the Petitioner that the retaliation interfered with any prospective business, educational, or other opportunities of the Petitioner. The trial court held there existed no evidence of actions by the Respondents which interfered with prospective business, educational or other activities of the Petitioner. This factual determination shall not be disturbed unless clearly erroneous.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, entered on March 12, 1996, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The Opinion of the United States District Court for the Eastern District of Virginia, entered on January 18, 1995, is found within the trial transcript (Jt. App., Vol. II., pp. 208-215). A copy of the trial court's opinion is reproduced in the Appendix attached. (App. A.1-A.9)

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. Procedural History

The complaint in this case was filed in the United States District Court for the Eastern District of Virginia on the 8th day

of July, 1994, alleging counts of gender discrimination, constructive discharge, retaliation, and intentional infliction of emotional distress. The District Court, District Judge Leonie M. Brinkema presiding, conducted a bench trial on January 18, 1995. At the close of Gnadt's presentation of evidence, Respondents moved for judgment as a matter of law under Federal Rule of Civil Procedure 52(c) on all claims. The District Court granted the motion *in toto*. Gnadt filed a Notice of Appeal on February 13, 1995, appealing only the gender discrimination and retaliation counts. The appeal was docketed in the United States Court of Appeals for the Fourth Circuit on March 10, 1995.

On March 12, 1996, a panel of the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion, which is reproduced in the appendix of the Petition for a Writ of Certiorari affirming the District Court's entry of judgment with respect to Gnadt's post employment retaliation claim and remanding the discrimination claim to allow Respondents to articulate a legitimate non-discriminatory reason for the lateral shift change of the Petitioner.

On May 10, 1996, further proceedings were held in the District Court. After Respondents' presentation of additional evidence, the Court again dismissed the Petitioner's gender discrimination claim, finding that the employer had a legitimate non-discriminatory reason for the lateral transfer of the Petitioner's job assignments.

Petitioner appeals only the retaliation claim having abandoned all other counts. In her Petition for the Writ of Certiorari, Gnadt argues that a majority of the Circuit Courts have construed § 704(a) to protect former employees against acts of post employment retaliation arising out of and relating to their former employment. The Petitioner requests that the term

"employees" be interpreted liberally to include former employees. The term "employee" is not ambiguous. Employee is defined as "an individual employed by an employer." 42 U.S.C.A. § 2000e(f). Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed.

B. Factual Summary

1. Employment History

In January, 1992 the Petitioner commenced her employment as a waitress with Castro Family, Inc., the corporate owner of Mama's Italian Restaurant and Tino's Sports Lounge. Prior to her employment with Castro Family, Inc. the Petitioner had never been employed as a bartender. In 1992 the Petitioner worked 60 percent of her hours as a bartender and 40 percent as a waitress. In 1993 the Petitioner's hours were split equally between bartending and waitressing (App., Vol. II., p. 140). The Petitioner admits that it is not degrading to work as a waitress. During the Summer of 1993, the Petitioner, a law student, pursued employment in the legal profession and felt the necessity to clerk additional hours with her secondary employer, a law firm. (Jt. App., Vol. II., p. 71). The Petitioner reduced her hours of employment with Tino's by yielding one of her shifts to another employee.

As summer came to an end and as football season approached, the Petitioner requested that she be allowed to work Sunday days and an additional shift. (Jt. App., Vol. II., p. 35). Castro assigned Gnadt to the Sunday day shift and the Tuesday evening shift commencing August, 1993. Due to a conflict with Gnadt's school schedule she switched her Tuesday night shift with the Monday night shift held by another employee, Jennifer Cohn. Cohn had worked as a bartender on Monday nights, while

the Petitioner had worked as a cocktail waitress on Tuesday nights.

In late August, 1993 a meeting was held at the restaurant. (Jt. App., Vol II., p. 78). In attendance at the meeting were Castro, Bernardo Terrazas, Gnadt, Paulette Duval, and most of the bartenders and waitresses. As a result of members of the staff leaving the Commonwealth of Virginia for college and other professional and employment opportunities, the need for additional personnel during peak hours of the restaurant was discussed. (Jt. App. Vol. II., pp. 79-83). Management decided to place an advertisement in the newspaper to hire additional bar and wait staff. Two additional bartenders were hired, Suzanne Gonzales (female), and Michael Devine (male).

In an attempt to integrate Devine and Gonzales into staff rotation, Devine was assigned to work Monday evenings as a bartender. Gnadt's Monday night shift was rescheduled to Friday night. Gnadt admits that management decides how to integrate new hires and determines shift schedules. Gnadt admits she never spoke to Devine about his assignments or shifts. Gnadt admits she does not know whether or not the shift assignments were to accommodate Devine's conflicts with other work commitments. A witness, Diane Fallon, called on behalf of Gnadt, admitted that Castro informed Gnadt why he had hired Devine and "juggled" the schedule. (Jt. App., Vol. II., p. 184).

The notice of the scheduling change was communicated to Gnadt on October 15, 1993. (Jt. App., Vol. II., p. 42). Gnadt, upset at her shift change, simply failed to show up for her scheduled Sunday day shift on October 17, 1993. Gnadt admits that she resigned on October 17, 1993. (Jt. App., Vol. II., p. 129). On October 17, 1993 Gnadt communicated to Castro, after her non-appearance, that she was resigning. Castro responded that he did not fire Gnadt, that he did not consider Gnadt's transfer a

demotion, and that Gnadt would not experience a pay cut. Castro told Gnadt he did not want her to quit. (Jt. App., Vol. II., pp. 153-155).

2. Post Employment Activities

On or about December 2, 1993, after Gnadt had resigned, Castro called the home of a mutual acquaintance where Gnadt was house sitting and left the message on the telephone recorder.[1] Notwithstanding the message, Gnadt admits that she has no knowledge of any communication from Castro to any third party of the fact that an EEOC complaint was filed. Gnadt admits that she has no knowledge of any communication made by Castro to any prospective employer. Gnadt testified that she had no knowledge of any attempts by Castro to obstruct her ability to obtain employment. (Jt. App., Vol. II., p. 16). Gnadt admits that Castro did not threaten her physically or use vulgarity towards her. Gnadt admits that she interpreted the recorded telephone message to mean that Castro felt that he would prevail and "beat me down to a pulp in a court of law". (Jt. App., Vol. II., p. 164).

Following her resignation, Gnadt admits she successfully completed her law school studies, obtaining a cumulative G.P.A. in excess of 3.0. Gnadt admits that she continued clerking at the law firm of Martinez & Sandoval, P.C. (Jt. App., Vol. II., pp. 166, 167). Gnadt admits she obtained substantially similar employment at two restaurants, Bravo's and Applebee's. Gnadt admits that she successfully studied for and passed the bar exam in July, 1994.

After the recorded telephone message, Castro made no further attempts to contact Gnadt. (Jt. App., Vol. II., p. 61). The

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1. The text of the recorded message can be found on pages 3 and 4 of the Petition for Writ of Certiorari.

Petitioner was not deterred from seeking employment in the legal profession as she continued to search for employment. (Jt. App., Vol. II., p. 61).

Gnadt timely filed this Petition for a Writ of Certiorari, asserting only the retaliation count.

SUMMARY OF THE ARGUMENT

Protection against retaliation afforded by Title VII does not extend to former employees. 42 U.S.C. § 2000e-3(a) specifically states it is unlawful for an employer to retaliate against an employee or applicant for employment. No mention is made of former employees. Title VII's definition of employee is not ambiguous. Any further interpretation of the statute is unwarranted and unnecessary.

Exclusion of former employees is consistent with a plain reading of Title VII. The Fourth Circuit, sitting en banc in the case of *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376), acted correctly in holding that the anti retaliation provisions of Title VII does not extend to post employment retaliation. The courts that have extended anti-retaliation protection to include former employees have done so when retaliation results in discharge from a later job, a refusal to hire, or other professional or occupational harm. The Petitioner has suffered no such harm.

The Petitioner failed to demonstrate that the Respondents engaged in any adverse employment action which interfered with any prospective business, educational, or other opportunities of the Petitioner. The Petition for Writ of Certiorari should be denied. In the alternative, the Court should defer consideration of this Petition until the Court decides the case of

Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376).

REASONS FOR DENYING THE WRIT

I.

PROTECTION AGAINST RETALIATION UNDER TITLE VII DOES NOT EXTEND TO FORMER EMPLOYEES.

The anti-retaliation provisions of Title VII are found in 42 U.S.C.A. § 2000e-3(a), which states in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants of employment, . . . because he opposed any practice made an unlawful employment practice by this Title (42 U.S.C. §§ 2000e-2000e-17), or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Subsection 2000e(f) defines "employee", for purposes of all provisions of Title VII, as "an individual employed by an employer". 42 U.S.C. § 2000e(f). Because the language in Title VII's definition of "employee" is not ambiguous, there is no need to resort to the legislative history of the statute. *See United States v. Murphy*, 35 F.3d 143 (4th Cir. 1994).

Words should be interpreted according to their common usage and "[c]ourts are not free to read into the law what is not there, but rather should apply the statute as written." *K-Mart*

Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L. Ed. 2d 313 (1988).

As the Fourth Circuit Court of Appeals held in *Robinson v. Shell Oil Co.*, 70 F.3d 325, 328 (1995).

> If a statute defines a term in its definitional section then that definition controls the meaning of the term wherever it appears in the statute. *See Florida Department of Banking & Finance v. Board of Governors of the Federal Reserve System*, 800 F.2d 1534, 1536 (11th Cir. 1986). (Definition of term in definitional section of statute controls construction wherever that term appears throughout the statute), cert denied, 481 U.S. 1013, 107 S. Ct. 1887, 95 L.Ed 2d 494 (1987). As a general rule, a definition which declares what a term means necessarily excludes any meaning that is not stated.

The Fourth Circuit recognized that if the statutory language "is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion". *Id.* at 329 (quoting *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

The Respondents ask this Court to follow the Fourth Circuit's opinion *in toto*, which follows the well-settled rule that in the absence of express congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning.

There is no ambiguity in the statute's definition of employee. There is no question that to establish a prima facia

case of retaliation, under Title VII, requires the *employee* to suffer an "adverse *employment* action" which necessarily entails conduct that occurs during the employment relationship. One need only examine the statutes ordinary and simplistic language to ascertain that any adverse action, however unsavory, taken after the employment relationship has terminated, cannot be actionable under Title VII.

The Petition for Writ of Certiorari should be denied.

II.

ANTI-RETALIATION PROTECTIONS, IF APPLICABLE, EXISTS WHEN THE RETALIATION RESULTS IN DISCHARGE FROM A LATER JOB, REFUSAL TO HIRE, OR OTHER PROFESSIONAL OR OCCUPATIONAL HARM.

The Petitioner contends that the majority of Circuits have construed § 704(a) to protect employees against acts of post-employment retaliation by their past employers arising out of and related to their former employment. The Courts that have extended anti-retaliation protection to include former employees have done so when retaliation results in discharge from a later job, refusal to hire, or other professional or occupational harm. *See, e.g., Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991), (employer deprived former employee of "rare and prestigious" professional laurel in retaliation for filing discrimination claim); *Charlton v. Paramus Board of Education*, 25 F.3d 194 (3rd Cir. 1994) (school district alleged to have revived state proceedings for revocation of teacher's teaching certificate in retaliation for her decision to continue pursuing a Title VII action challenging her termination as discriminatory); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988) (former employer made adverse comment to prospective employer in retaliation for former employee's previous sex

discrimination suit); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982) (former employer refused to rehire and gave bad recommendations after termination and filing of the EEOC charges); *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052 (2nd Cir. 1978) (employer's refusal to furnish letters of recommendation in retaliation for the Plaintiffs having filed discrimination charges with the EEOC); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (former employee advised a prospective employer of fact that employee had filed a sex discrimination charge); *E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) (employer discontinued employee's severance pay because he had filed charge); *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139 (6th Cir. 1977) (employer informed a prospective employer of the fact that former employee had filed a complaint with the Department of Labor).

The Petitioner, in the case at hand, was not discharged from a later job. The Petitioner was not refused employment with a prospective employer for filing a claim. The Petitioner admits that she has no knowledge of suffering any professional or occupational harm. The trial court's factual findings suggest that there is no evidence whatsoever that any actions taken by the Respondents in any way interfered with the prospective business, educational, or other activities of the Petitioner. (App. A.5a). Accordingly, the Petition for Writ of Certiorari should be denied.

III.

THE DISTRICT COURT DID NOT ERR IN ENTERING JUDGMENT FOR THE RESPONDENTS ON PETITIONER'S RETALIATION CLAIM, HAVING FOUND THAT THE RESPONDENTS DID NOT INTERFERE WITH ANY PROSPECTIVE BUSINESS, EDUCATIONAL, OR OTHER OPPORTUNITIES OF THE PETITIONER.

Ross v. Communication Satellite Corp., 759 F.2d 355 (4th Cir. 1985), established a test for determining whether an employee has established a prima facia case of retaliation.[2] *Ross* in relying on the sequence of proof and burdens prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S. Ct. 1089, 1093-95, 67 L. Ed. 2d 207 (1981) held that a prima facia case of retaliation consists of three (3) elements:

(1) the employee engaged in a protected activity;

(2) the employer took adverse action against the employee; and

(3) a causal connection exists between the protected activity and the adverse action. *Id.* 759 F.2d at 365.

In *Fahie v. New York City Department of Corrections*, 737 F. Supp. 15 (S.D.NY 1990), the court, in granting the defendant's motion for summary judgment, held that to make out a prima facia case under section 704(a) of Title VII (42 U.S.C. § 2000(e)-3(a), the appellant must show that he engaged in an activity

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2. Ross did not address retaliation against a former employee.

protected under Title VII, that his activity was known by the alleged retaliator, *that an adverse employment action disadvantaging him occurred,* and that a causal connection exists between his participation in the protected activity and the adverse employment action. (Emphasis added).

In *Evans v. Davey Truckers, Inc.*, 769 F.2d 1012 (4th Cir. 1985), the employee (like the Petitioner), voluntarily resigned his employment and therefore suffered no adverse employment action at the hands of the employer.

In the case at bar the Respondent, Castro, exercised no control over the Petitioner after her voluntary resignation on October 17, 1993. The Trial Court correctly found that, the Petitioner failed to produce any evidence that the Respondents interfered with any employment opportunities of the former employee. (App. A. 5a) This Court need not decide the issue of whether threats to interfere with future employment opportunities of a former employee may constitute retaliation. The trial court's factual determination that the Petitioner suffered no adverse employment action was clearly not erroneous. The trial court found, through the Petitioner's own admissions, that there was,

> No evidence whatsoever that any phone calls or contacts, or any actions, had been taken by the Defendant to in any way interfere with prospective business, educational, or other kinds of activities. Therefore, I find no factual basis to support the Petitioner's case on the retaliation issue.

(Jt. App., Vol. II, p. 213; App. A. 5a).

In the case at hand, the Petitioner testified that she had no further contacts with her employer after having received possession of a recorded message left at the house of a third party. She admits that she continued to interview for employment in the legal profession. The Petitioner admits that there exists no evidence that the Respondents in any way interfered with her applications for employment. The Petitioner admits that she has no knowledge of any communication by the Respondents with any prospective employers. The Petitioner admits she has no evidence that Castro has defamed her to any third party. The Petitioner admits to having successfully maintained her clerkship. The Petitioner admits having secured two (2) other similarly situated waitressing and bartending positions at Bravo's and Applebee's. In fact, the Petitioner can point to no fact that suggests that there was ever a causal connection between the recorded message and *any* adverse effect upon employment opportunities.

The Petitioner asserts no error to the Trial Court's factual findings. Accordingly, the Petition for Writ of Certiorari should be denied. Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

The wording of § 704(a) is clear and unambiguous. Former employees are not protected against retaliation. The opinion of the Fourth Circuit is correct.

Anti-retaliation protection, if applicable at all, exists only when the retaliation results in a discharge from a later job, refusal to hire, or other professional or occupational harm, factors which are non-existent in the case at bar.

The Respondents did not interfere with any prospective business, educational, or other opportunities of the Petitioner. The Petition of Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTED TRANSCRIPT OF PROCEEDINGS

[Commencing at page 208]

* * *

and I will consider the arguments. I want to look at one thing back in Chambers, one of the cases. And I will give you a ruling at the end of the break. Ten minutes.

(Whereupon, at 3:58 o'clock p.m., a short recess was taken.)

THE COURT: All right. I'm going to take the counts in the order in which they are filed in the complaint.

The first count is the discrimination count. The plaintiff has certainly made out several of the elements there. She has made out the fact that she is a member of the protected class. I'm going to find that she was qualified for the bartender position based upon the fact she had been doing the job at the defendant corporation.

Whether the plaintiff was rejected — she certainly didn't apply for a position — whether she was demoted is certainly an issue that is up for grabs, because there is certainly evidence before the Court that the Friday night position would have generated an equal amount if not more of tips. But I again at this stage of the proceedings have to draw the inferences in favor of the plaintiff, and therefore will make a finding that at least at this stage of the evidence, that the plaintiff has been able to make the burden that she was to some degree demoted. Although I will note it was a very de minimis demotion. At most it was $2 [209] an hour for what, a six or seven-hour shift. So we are talking about $12 to $14 per week difference in pay.

But then there's also the issue about whether it's a demotion to go from bartender to waitress. That's more of I guess a psychic demotion. But again I will make that finding as well.

And then the fourth, the person who happened to fill her position was a member of an unprotected class.

Now, it's true that Mr. Devine was a male and he actually replaced the plaintiff, but the evidence is also unrefuted that in fact two bartenders were hired. It was serendipitous, it seems to me, and there is no evidence one way or the other as to why — there's evidence that's come in — no, it hasn't, that was in the opening statement. There is no evidence as to why Devine got those particular days versus the woman. But clearly a woman bartender had been hired. So in that respect the plaintiff has made out a prima facie case.

However, there's also clearly before the Court in the evidence that's been brought in so far the fact that there was a need to hire additional personnel, and the plaintiff herself has admitted that it was completely up to the discretion of Mr. Castro to hire those people whom he needed to fulfill his personnel needs.

I think therefore that that evidence is strong [210] evidence in the defendant's favor of a nondiscriminatory reason for arranging the shifts the way they were done.

The only piece of evidence in this case whatsoever, in my opinion, that there was any kind of a gender bias in this particular arrangement of the employment shifts is the one statement by Mr. Bernardo that it would look tacky to have a male bartender and a female waitress. But there is no evidence that Mr. Bernardo

had anything to do with the decision to either hire Mr. Devine or to make the shift assignments that were at issue in this case.

Moreover, there's certainly a strong history in that agency of female bartenders with male waiting persons. And therefore I don't believe that the plaintiff has met her burden of establishing a case that there was gender bias involved in the reallocation of the work shifts.

And so as to count 1, I'm going to enter judgment as a matter of law for the defendant.

Now, the rest of the counts, frankly, are I think for the Court based on the evidence in this case, much easier to resolve.

On the constructive discharge, there is quite clearly in my mind no evidence to show that there was any deliberate effort made on the part of Mr. Castro to create an intolerable working situation for the plaintiff. The evidence is that they were shifting around personnel [211] people. There was no evidence that he wanted the plaintiff to quit. In fact, the evidence from the plaintiff's own testimony is that during the course of the conversation, at one point Mr. Castro said, "I don't want you to quit."

Furthermore, the working conditions, in the Court's opinion, are not the type of intolerable working conditions which the cases have pointed to. At most, it was an change of night, a change of function from bartending to waitressing. There is a $2 an hour hourly rate diminution in salary, but that's not an intolerable working condition in this Court's eyes.

Thirdly I think here that the voluntary resignation of the

plaintiff under these circumstances was unreasonable. This plaintiff had worked for I guess it was about a year-and-a-half for this defendant, and, you know, there is no evidence in this case whatsoever that up until this point there was ever any real problem between the plaintiff and her employer. It doesn't seem reasonable to me on this kind of a situation alone that a long-term employee would just up and quit. In fact the record shows that the company, that the defendants had been very accommodating to work shifts changes all the time to accommodate changes in the plaintiff's school schedules.

So the picture that's been painted for the Court is of a fairly accommodating and reasonable employer [212] allowed you to come in to some of your shifts late. Remember there was testimony about that. Who had worked with you to keep you employed. And even after the October 15th weekend, at least as of the 17th, Mr. Castro was still asking you to come back.

So I think it was an unreasonable voluntary resignation and not constructive discharge. So the court is again entering judgment for the defendant as a matter of law.

Now on the retaliation claim, I think that you are correct, Ms. Lyons, on the issue that the Fourth Circuit case is no longer good law. And, frankly, I think that is probably basically a therapeutic and a good result. So in terms of the legal issue, I think it is possible for this Court to find that retaliation occurred, at least from a legal standpoint. But again I have to look at the facts that are before me.

Now I have got to say that Mr. Castro's statement is one of the dumber things he's probably ever done in his life. I'm sure he regrets it. And it was an expensive error because I think it was

probably part of what fueled the fire for this case anyway. It should not have happened. The plaintiff had an absolute right to file an EEOC complaint if she wanted to. And it was further aggravated, although it is not part of the retaliation issue [213] here, by once a lawyer writes a letter to somebody saying I represent someone, you know, deal with me, to go on and try to deal with that person directly is also really very bad conduct. I'm sure that Mr. Beckwith has counseled Mr. Castro about that.

However, what the Court has to look at with retaliation is whether or not there is any evidence in the case that the defendant interfered with any prospective employment opportunities for the former employee, and there is absolutely no evidence of that other than a threat by Mr. Castro to keep the plaintiff from ever getting a law job.

She herself admitted several times because I think Mr. Beckwith sort of beat it into the ground that she had no evidence whatsoever that any phone calls or contacts or any actions had been taken by the defendant to in any way interfere with prospective business, educational, or any other kinds of activities. And therefore, I find no factual basis to support the plaintiff's case on the retaliation issue. And I'm entering judgment as a matter of law as well for the defendant on Count 3.

And on count 4, that one is that intentional infliction of emotional distress in Virginia and in the Fourth Circuit is an extremely, as you know, Ms. Lyons, extremely hard cause of action to make out, and certainly under the facts that are here, it is simply not there.

[214] First of all, the Court has had the benefit of listening to the tape, which is the critical piece of evidence on this issue, and

the voice, anybody listening to the voice of Mr. Castro, while the words are upsetting, I don't deny you that, the tone of voice is not what I would say any average person would call to be a threatening tone of voice.

Secondly, there's just in my opinion no solid evidence, not even flimsy evidence, there is no evidence of any kind of a severe or serious emotional distress. The plaintiff simply has not presented anything other than the fact that she was upset, but that's not what the law calls severe emotional distress.

There was no counseling. There wasn't even serious enough of a problem to discuss it a lot with her boy friend. Most people if they are really upset about something are going to talk about it with somebody.

There is no evidence of sleeplessness. It didn't interfere with her school work.

The only piece of evidence that I could see in the record about some impact was the attorney's testimony that she seemed distracted, and that her work had suffered. I don't think distraction is equivalent in Virginia to severe emotional distress. And so for that reason, judgment will also be granted to the defendant on count 4.

[215] And therefore, I believe that terminates the case, because all four counts have now been ruled upon.

If there's anything further — we have — there are some tax records that are in among the exhibits here that are in court. I don't like to leave tax records just floating around in the case file. But you all have to decide how you want to proceed from here.

All right. But I don't believe there's anything further we need to address today.

Mr. Beckwith?

Anything further from the defendants?

MR. BECKWITH: I would be willing if counsel would want to supplement copies of the tax records to have the originals returned.

MS. LYONS: I don't think there are any originals.

THE COURT: I mean, if you want to leave them in for purposes of the record, although frankly they were never admitted into evidence. I don't think you used them in your case in chief.

MS. LYONS: No, I did not.

THE COURT: You never got to the defendants' case. So you can decide how you want to sort through that stuff. All right?

MS. LYONS: All right.

Thank you, Your Honor.

[216] THE COURT: Thank you.

We will recess court until 8:45 tomorrow morning.

Whereupon, at 4:20 o'clock p.m., the above-captioned matter was concluded, and court stood in recess.